United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF FOR APPELLANT AND APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

United States Court of Appeals
For the
District of Columbia Circuit
FILED JAN 28 1958
Joseph W. Stewart
CLERK

No. 14,220

981

JULIET R. BRYAN,

Appellant,

v.

CHALMERS F. GROFF,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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EX 3-0625

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QUESTION PRESENTED

Whether the lower court erred in granting summary judgment to Appellee in the absence of counsel for Appellant.

UNITED STATES COURT OF APPEALS

For The District Of Columbia Circuit

No. 14,220

JULIET R. BRYAN,

Appellant

v.

CHALMERS F. GROFF,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

The jurisdiction of this Court under 15 Stat. 726, 28 U.S.C. 1291 (1952 Edition) to review the action of the District Court in this proceeding. The Court below entered an order of Summary Judgment on the 4th day of October, 1957, and it is from that order that this appeal is taken.

STATEMENT OF THE CASE

Appellant filed a complaint on the 29th day of May, 1957, against Chalmers F. Groff, trustee, defendant "To Reform note and other relief". An answer was filed thereto on the 3rd day of July, 1957.

Appellee filed a "Motion For Summary Judgment" on the 19th day of August, 1957. Appellant filed an answer to the Motion for Summary Judgment on the 1st day of October, 1957.

The appellee's Motion for Summary Judgment was heard in the absence of appellant's counsel on October 2, 1957.

The appellee's Order for Summary Judgment was signed after certain representations by counsel for counsel for appellant on October 4, 1957.

SUMMARY OF ARGUMENT

It was a plain abuse of discretion by the Court to award Summary Judgment to the appellee when the Court should have known or by the application of the smallest amount of endeavor could have found that appellant's counsel was actively engaged in trial before another division of the Court at the time this Motion was called for hearing.

That the Court again is charged with an abuse of discretion when on October 4, 1957, counsel for counsel for appellant informed the Court that counsel wished the hearing on the order continued stating the reason for appellant's counsel's failure to appear at the hearing October 2, 1957.

That the Court's action in proceeding with the hearing on October 2, 1957 and the entry of the order of October 4, 1957 effectually denies appellant her right to be heard in this matter.

ARGUMENT

For some days appellant's counsel had been alerted to be ready in the case of Maddox v. Maddox, Civil Action No. 5088-54, a contested divorce case on the grounds of adultery which had been on the docket since 1954. This case was finally set for trial October 2, 1957 at

10:00 a.m. Counsel for appellant then received a card from the Court stating the Motion for Summary Judgment in this case was set for October 2, 1957, at 10:00 a.m. On October 1, 1957 at 3:00 p.m., not hearing from the Assignment Commissioner of the Court as to any continuance in either matter, counsel for appellant called the Motions Clerk's Office of the Court and advised he would not be able to attend the hearing on the Motion for Summary Judgment on October 2, 1957 because he would be engaged in trial. He was then asked which Judge he would appear before and replied, "it had not been determined, that he and all witnesses were to report to the Assignment Commissioner at 10:00 a.m.". Counsel was advised this information would be imparted to the Motion Court's Clerk.

On October 2, 1957, counsel for appellant, together with all witnesses in the matter of Maddox v. Maddox appeared in the Office of the Assignment Commissioner. Counsel for appellant was told one of three judges would be available at most any time to hear the Maddox case but that he was to go to the Motions Court and dispose of that motion if it was reached before a judge was available to hear the Maddox case, but to keep in close touch with the assignment office.

Counsel for appellant reported to the Motions Court at 10:00 a.m. on October 2, 1957. This case was #4 on the daily assignment. At 10:45 a.m. counsel for the plaintiff in case #1 on the assignment completed his argument. At that time appellant's counsel indicated to the Court's Clerk that he was going down to the Assignment Commissioner's Office and wrote on the back of an envelope and showed it to appellee's counsel who was seated directly in back of him. "Am going to Assignment Commissioner to check on case". He replied, "Gene, you had better tell it to the Judge's Clerk". With that appellant's counsel went to the Assignment Commissioner's Office and was told to report immediately for trial of the Maddox case in another Court, where he went and remained in trial for two days.

That some time after he had started trial in the Maddox case the Motion for Summary Judgment was called for hearing in this cause and the record discloses counsel for appellee stated, "Mr. Bryan was here this morning at about 10:15 a. m. but I haven't seen him since". The Court's Clerk made no disclosure of her previous notification.

On October 3rd, upon receiving copy of the proposed order for Summary Judgment and that the order would be presented October 4th at 10:00 a. m., he immediately contacted other counsel to appear for him, he having a matter set in another jurisdiction requiring his attention, and requesting that attorney request a continuance and tell the Court what had happened on October 2nd.

This attorney called counsel for appellee, explained the situation and requested a continuance. He was told he would not consent and to address his request to the Court. Counsel did address his request to the Court and it was denied.

CONCLUSION

In light of the foregoing reasons advanced, appellant urges a reversal of the action taken by the District Court in its order of October 4, 1957, granting Summary Judgment to the appellee in this cause.

Respectfully submitted,

H. EUGENE BRYAN

635 F Street, N. W.
Washington, D. C.

Attorney for Appellant

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APPENDIX FOR APPELLANT

1 [Filed May 29, 1957]

JULIET C. BRYAN R. F. D. #3 Fredericksburg, Virginia Plaintiff	:	
vs.	:	Civil Action No. 1298-57
CHALMERS F. GROFF, Trustee 416 Fifth Street, N. W. Washington, D. C. Defendant	:	

COMPLAINT TO REFORM NOTE AND OTHER RELIEF

Plaintiff sues the defendant, Chalmers F. Groff, in his representative capacity as trustee only, for that heretofore to wit on the 8th day of March, 1955, she executed a certain promissory note in the amount of $2,400.00, secured by a deed of trust on premises known as, "Lot 32 in D. B. Groff's Subdivision of lots in Square 868 as per plat recorded in Liber 12, folio 22, in the Surveyor's Office for said District of Columbia," designated as 28 Seventh Street, N. E., Washington, D. C., and in which the defendant was designated as one of the trustees; that the Union Finance Company of Silver Spring, Maryland, agreed in advance to the making of said note and trust, to pay the sum of $2,100.00 for said note, exacting as a bonus for making said loan the sum of $300.00; that the charge of said bonus was and is a violation of the usury laws for the said District of Columbia.

Plaintiff is desirous of paying to said Union Finance Company the amount due it but said Union Finance Company and its attorney are demanding the balance due on the amount advanced, plus interest and bonus.

2 That said Union Finance Company has advised it intends to foreclose on the aforementioned property and plaintiff says that it is estopped from pursuing such action because of its systematic dealings with the plaintiff within the past years.

Plaintiff further says that were the defendant and the Union Finance Company to proceed with said foreclosure as announced it would cause her irreparable injury.

WHEREFORE, the premises considered, plaintiff prays:

1. That the loan made by the Union Finance Company to the plaintiff be declared usurous.

2. That an accounting be had between the parties to determine the balance due the Union Finance Company.

3. That during the pendency of this proceedings this Court issue a preliminary injunction restraining the defendant and all those acting in consert with him from proceeding with any foreclosure proceedings against said property.

4. And for further relief.

/s/ H. Eugene Bryan
Attorney for Plaintiff
Columbian Building
Washington, D. C.

---

3 [Filed May 29, 1957]

MOTION FOR PRELIMINARY INJUNCTION

Comes now the plaintiff in the above entitled cause and moves the Court for an Order restraining the defendant and all those acting in consert with him from proceeding with a foreclosure proceedings against the property designated and set forth in the verified complaint attached hereto and as grounds therefore refers to the complaint filed herein, incorporated and made a part of this Motion.

/s/ H. Eugene Bryan
Attorney for Plaintiff

4 [Filed July 3, 1957] ANSWER

First Defense

1. The complaint fails to state a cause of action upon which relief can be granted.

Second Defense

1. Defendant admits that he is a trustee under a second deed of trust made by the Plaintiff herein and endorsed by her husband, her counsel herein.

2. Defendant states that the Union Finance Company, of Silver Spring, Maryland, is the holder of said note and upon information and belief states that said note is in default and that payment in full of said note has been demanded of the Plaintiff which to date she has failed and refused to pay.

3. All of the remaining allegations of the complaint are denied.

Third Defense

1. Defendant states that these same matters complained in this present proceeding were raised by the Plaintiff under Civil Action #3330-55 which was dismissed in this court with prejudice. Therefore, the matters raised in this suit are res adjudicata.

Fourth Defense

1. Plaintiff and her counsel have not filed this suit in good faith because they have failed to tender the amount due under the note obligation sued upon.

5 2. Plaintiff and her counsel have likewise failed to pay the note obligation sued upon when demand for payment in full was served upon them after the note became in default.

3. No foreclosure proceedings were instituted and this suit is premature.

4. Plaintiff and her counsel do not come into Court with clean hands because Plaintiff's counsel negotiated the note involved herein, and arranged for its execution and sale and well knows that the same is not usurious.

Fifth Defense

1. Defendant specifically denies each and every allegation of the complaint not specifically admitted.

/s/ N. Meyer Baker
613 - 15th St. N.W. Suite 710
Washington, D. C.
Attorney for the Defendant

[Certificate of Mailing]

---

6 [Filed July 3, 1957]

OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION

1. Neither the motion nor the pleadings in this case are under oath as required by the rules of this Court.

2. The note referred to in the complaint was in default and in accordance with the terms of said note, the Union Finance Company as the holder thereof, demanded payment in full on or about May 27, 1957. When payment as above demanded was not made, Union Finance Company initiated foreclosure proceedings by instructing the Defendant, as trustee, to proceed with foreclosure. When the instant suit was filed and the Defendant, as Trustee, was served, no further action was taken on the foreclosure proceeding.

3. No irreparable damage is threatened requiring the issuance of an injunction by this Court.

4. This matter has been before the Court in a prior proceeding under Civil Action #3330-55 in this Court and the matter was dismissed with prejudice and is therefore res adjudicata.

/s/ N. Meyer Baker
* * * *
Attorney for the Defendant

[Certificate Of Mailing]

---

7 [Filed August 19, 1957]

MOTION FOR SUMMARY JUDGMENT

Now comes the Defendant, by his attorney of record, and moves this Honorable Court to grant him a summary judgment in his favor and for reason states that there is no genuine issue as to material fact and as a matter of law, Defendant is entitled to judgment.

NOTICE

To: H. EUGENE BRYAN
416 - Fifth Street, N. W.
Washington, D. C.
Attorney for Plaintiff

Rules of Court require that you file any opposition to the granting of the above-entitled motion within five (5) days after you receive a copy of it.

POINTS AND AUTHORITIES IN SUPPORT OF MOTION

1. The record in this case.

2. Civil Action #3330-55 in this Court involving these same parties.

3. A copy of the account of the first trust loan on the property which is the subject of this litigation, from which it clearly appears that the Plaintiff has and continues to endanger the security given for the second deed of trust note involved herein by her past and continuing failure to make the payments called for under the first deed of trust note as and when the same fall due resulting in repeated threats of foreclosure under the provisions of the first deed of trust note on this property to

8 which the second deed of trust note is subordinate and thereby constantly endangering the security given for this second deed of trust note.

4. Plaintiff does not come into Court with clean hands by virtue of the foregoing.

5. Plaintiff's actions of securing the rents and profits from the property while neglecting to pay the obligations due thereon as and when the same fall due, prevents any aid to the Plaintiff by this Court because she fails to do equity while she seeks the aid.

/s/ N. Meyer Baker
Attorney for the Defendant

[Certificate Of Mailing]

9 [Filed October 1, 1957]

ANSWER TO MOTION FOR SUMMARY JUDGMENT

Comes now the plaintiff in the above entitled cause and moves the Court to dismiss the Motion for Summary Judgment and as grounds therefore states:

1. That there is a genuine issue of a material fact in this case.

POINTS AND AUTHORITIES IN SUPPORT OF MOTION

1. Record in this case.

/s/ H. Eugene Bryan
Attorney for Plaintiff

* * * *

[Certificate of Mailing]

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10 [Filed October 4, 1957]

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Upon consideration of the Defendant's Motion for Summary Judgment filed herein and after argument in open Court, it is by the Court this 4th day of October, 1957 --

Ordered

1. That said Motion be, and the same is, hereby granted.

/s/ Alexander Holtzoff
Judge

Notice

To: H. Eugene Bryan, Esq.
416 - Fifth Street, N.W.
Washington, D. C.
Attorney for the Plaintiff

This is to advise you that the foregoing Order will be presented to the Honorable Judge Alexander Holtzoff for signature at 10:00 a.m., Friday, October 4, 1957, or as soon thereafter as counsel may be heard.

/s/ N. Meyer Baker

* * * *

Attorney for the Defendant

[Certificate Of Mailing]

11 [Filed October 9, 1957]

NOTICE OF APPEAL

Notice is hereby given this 9th day of October, 1957, that Juliet C. Bryan hereby appeals to the United States Court of Appeals for the District of Columbia from the judgment of this Court entered on the 4th day of October, 1957, in favor of Chalmers Groff against said Juliet C. Bryan.

/s/ H. Eugene Bryan
Attorney for Plaintiff

---

15 EXCERPTS OF TRANSCRIPT OF PROCEEDINGS

[Filed December 19, 1957] Washington, D. C.
October 2, 1957.

The above-entitled action came on for hearing on defendant's motion for summary judgment, before the HONORABLE ALEXANDER HOLTZOFF, United States District Judge,

APPEARANCES:

On behalf of the defendant:

MR. N. MEYER BAKER

16 THE DEPUTY CLERK: Bryan v. Groff.

MR. BAKER: Ready for the defendant.

THE COURT: Is the other side here?

MR. BAKER: Mr. Bryan was here this morning at about 10 or 10:15, but I haven't seen him since.

THE COURT: The Court will hear you.

MR. BAKER: This is a motion for summary judgment. This is a suit to prevent the foreclosure under a second deed of trust note which is held with the defendant named as trustee thereon.

The basis of the motion for summary judgment is that the same suit, the same facts, the same parties were disposed of by a dismissal in Civil Action No. 3330-55 in this Court, and I have the jacket here before me, and I hand it to the Court, so that the matter is now res judicata.

THE COURT: Well, there was no final judgment.

MR. BAKER: The matter was dismissed with prejudice.

THE COURT: I don't see any dismissal with prejudice or without prejudice.

MR. BAKER: If Your Honor please, I think there is a praecipe in the file showing it was dismissed with prejudice.

17 THE COURT: Oh, yes. Well, there is nothing in your motion which states that you rely on res judicata. I think you may have a good case of res judicata, but it isn't so stated in your motion. You give entirely different grounds.

You see, in the absence of the other side I do not feel justified in taking them by surprise and granting your motion on default on a ground which is not in your motion.

MR. BAKER: If the Court please, it was set forth not only in the motion filed in this case but in opposition to the motion for preliminary injunction which was filed by the plaintiff but never granted in this case, - if Your Honor will look at the third defense set forth in the answer and as well in the opposition to the motion for preliminary injunction.

THE COURT: That of course wouldn't matter. I do think you should have mentioned it in your motion. However, you do refer to the filing of this other suit in your motion. Which defense is res judicata?

MR. BAKER: No. 3, the third defense, sir.

THE COURT: I will grant the motion.

MR. BAKER: Thank you, sir.

* * * * *

18 Washington, D. C.
October 4, 1957.

The above-entitled matter came on as a preliminary matter before the HONORABLE ALEXANDER HOLTZOFF, United States District Judge, at 10 o'clock a. m.

APPEARANCES:

On behalf of the defendant:

MR. N. MEYER BAKER.

19 THE COURT: Proceed.

MR. BAKER: I have here an order granting the defendant's motion for summary judgment in the case of Bryan vs. Groff, which Your Honor heard two days ago.

MR. EWING: A message was left with my secretary by Mr. Bryan requesting that I inform the Court that he was unable to be here when the matter was heard day before yesterday because he was engaged in court, and requesting that Your Honor set it for another hearing.

THE COURT: If he wasn't here because he was engaged in Court he should have sent some notice, or something of that kind.

MR. EWING: All I know, Your Honor, is the message that was left for me.

THE COURT: The Court appreciates your position, of course, but if he has a meritorious excuse --

MR. EWING: He asks that I inform the Court he is engaged in a case in Virginia today and therefore was unable to be here.

THE COURT: He should have asked for a continuance here if he was engaged in another court. I think it was gross discourtesy for counsel just to say nothing and then come back on another day and say

20 I was in another court.

MR. EWING: I will inform him.

THE COURT: I am signing the order.

(Thereupon, the instant proceeding was concluded.)

* * * * *

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

United States Court of Appeals
For the
District of Columbia Circuit
FILED MAR - 4 1958
Joseph W. Stewart
CLERK

No. 14,220

JULIET R. BRYAN,

Appellant,

v.

CHALMERS F. GROFF,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

N. MEYER BAKER
613-15th Street, N. W.
Suite 710
Washington 5, D. C.
Attorney for the Appellee

Washington, D. C. ROBERT I. THIEL EX 3-0625

STATEMENT OF THE QUESTION PRESENTED

Since the Appellant in her typewritten brief served upon Appellee's counsel failed to comply with Rule 17(c) of this Court in stating the question presented for decision, and since receiving a copy of Appellant's brief in this cause, Appellee believes that the question presented for decision as set forth in that brief is not correctly stated. Appellee will restate the question presented.

The question presented is:

> "Was it an abuse of judicial discretion for the trial court to grant a proponent's motion for summary judgment in the absence of opposing counsel when opposing counsel was present in the courtroom at the time set for the hearing on the motion and then absented himself from the courtroom without any advice or notice to the Court explaining or excusing his absence, or without requesting a continuance or a delay on the hearing of the motion?"

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UNITED STATES COURT OF APPEALS

For The District of Columbia Circuit

No. 14,220

JULIET R. BRYAN,

Appellant,

v.

CHALMERS F. GROFF,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLEE

COUNTER-STATEMENT OF THE CASE

On May 29, 1957, Appellant filed a suit entitled "Complaint to Reform Note and for Other Relief," attaching to the unverified Complaint (R. 2) a Motion for Injunction (R. 3). The Motion was never calendered for hearing as required by the rules of Court. This suit was, in substance, a duplicate of a prior suit filed by the Appellant on July 28, 1955 (R. 7) against the Appellee in the Court below in Civil Action No. 3330-55, involving the same property and against the same Defendant and requesting identical relief to that requested in the present suit. This latter suit had been dismissed with prejudice (R. 6).

The Complaint filed in the Court below constituted a "lis pendens" on the real property involved in the instant proceeding.

Opposition to the Motion for Preliminary Injunction was filed on July 3, 1957 (R. 6) at the same time the Answer was filed (R. 4, 5).

On August 19, 1957, Appellee filed his Motion for Summary Judgment (R. 7) and calendered the same. Answer to this Motion was filed on October 1, 1957 on the day before that set for the actual hearing on the Motion (R. 15).

On October 2, 1957, the date set for the hearing on the Motion both counsel for the Appellant and the Appellee were present in Court before the case was called for hearing (R. 16). Just prior to hearing, counsel for Appellant left the Court and did not appear at the hearing nor was any advice or information furnished to the Court to explain or excuse the absence of Appellant's counsel from the hearing (R. 16).

The Court heard the Motion for Summary Judgment, inquired into the same fully (R. 15, 16 and 17) and thereafter granted the Motion.

On October 2, 1957 routine notice was given to Appellant's counsel of the proposed date for the presentation of the proposed Order Granting the Motion and the Summary Judgment.

On October 4, 1957, the date set for the presentation of the Order Granting Judgment, other counsel appeared (R. 19) and advised the Court that Appellee's counsel had been engaged in the trial of another case on October 2, 1957, the date set for the hearing on the Motion for Summary Judgment, and asked that this hearing be set for another time (R. 19).

The Court stated that if Appellant's counsel was engaged in another court he should have sent some notice or something of the kind and that it was gross discourtesy to say nothing and then come back another day and say that he was in another court (R. 19). Thereupon the Court signed the order granting Appellee judgment (R. 20).

On October 9, 1957, an appeal was taken from the judgment entered October 4, 1957 (R. 11).

RULES INVOLVED

Rule 23. When Appeal Taken Merely for Delay; Interest, Damages and Double Costs May be Imposed

In all cases where an appeal delays proceedings on the judgment of the lower court, and appears to have been sued out merely for delay, damages at a rate not exceeding ten per cent, in addition to interest, may be awarded on the amount of the judgment, and double costs may be imposed. No such judgment shall be entered unless claim therefor is made by Appellee in his brief or Appellant is afforded reasonable opportunity to be heard on this issue.

RULES OF FEDERAL CIVIL PROCEDURE

Rule 60 - Relief from Judgment or Order

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud; etc.

On motion and upon such terms as are just, the Court may relieve a party or his legal representative from a final judgment, order or proceeding for the following reasons:

***(6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2) or (3) not more than one year after the judgment, order or proceeding was entered or taken.

Rule 65 - Temporary Restraining Order; Notice; Hearing; Duration

(b) No temporary restraining order shall be granted without notice to the adverse party unless it clearly appears from specific facts shown by affidavit or by the verified complaint***that immediate and irreparable injury, loss or damage will result to the applicant before notice can be served and a hearing had thereon***in case a temporary restraining order is granted without notice, the motion for a preliminary injunction shall be set down for hearing at the earliest possible time,

and takes precedence over all matters except older matters of the same character***.

LOCAL RULES OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Rule 9 - Motions

(b) Points and Authorities; Entry of Motion, Etc.

*** The moving party shall enter the motion and the fact of filing the statement on a card provided by the clerk.

(d) Non-Appearance of Parties.

If at the time set for hearing there be no appearance for the moving party the Court may treat the motion as submitted or waived, or continue or strike it from the motion calendar. If there be no appearance for the opposing side, it may be treated as conceded. (Underscoring supplied by Appellee).

SUMMARY OF ARGUMENT

1. The Trial Court's action was correct in granting Appellee's Motion for Summary Judgment without appearance on behalf of the Appellant.

2. The Trial Court was further justified in its action by the fact that it considered the record and evidence in the case in passing on the Motion.

ARGUMENT

1. There Was No Abuse of Judicial Discretion In Granting Appellee's Motion For Summary Judgment in the Unexplained or Unexcused Absence of Her Counsel at the Hearing on The Motion.

It is clear from Appellant's brief in this cause that Appellant's counsel knew that he had two matters set for October 2, 1957, one of which was the Motion for Summary Judgment in this case and the other

was a contested divorce trial. Appellant's counsel knew or should have known that he could not appear in both matters in different courts at the same time. He had ample notice of both of these matters well in advance of the critical date of October 2, 1957. Yet he made no attempt to convey this information to the Trial Court hearing the Motion for Summary Judgment in this case nor did he request a continuance for the Motion or have some other counsel request such a continuance or even appear for the Appellant as he did on the date of the presentation of the Order Granting the Judgment.

The suit filed by the Appellant in the lower Court sought injunctive relief, a matter generally requiring prompt and expeditious action. Nevertheless she permitted the litigation to lie dormant for more than four months and took no steps to have the Trial Court act upon her motion for injunction filed on May 29, 1957 with the Complaint. The only possible conclusion is that Appellant never intended to have the Court act on her Motion but only used the suit to encumber the title to the real property secured by a deed of trust note, thereby effectively preventing any foreclosure action under the trust note secured.

When the Appellee's Motion for Summary Judgment was called for hearing, the Court inquired for Appellant's counsel (R. 16). He was advised by Appellees' counsel that Appellant's counsel had been in Court a few minutes before but was not then present in the courtroom. The Court then announced that it would hear the matter (R. 16). After listening to argument on the Motion and inquiring fully into it, inspecting the record and other evidence before him, the Court granted the Motion.

Neither that day nor the following day did Appellant or her counsel, or anyone on her behalf, make any effort to inform the Court that he was or had been engaged in another Court on another matter despite the fact that Appellant's counsel had been present before the Court before the hearing on the Motion for Summary Judgment. It would have required minimal effort on the part of Appellant's counsel, as a

preliminary matter, to inform the Court that he was engaged or about to be engaged in an imminent trial requiring his presence elsewhere. That was the appropriate and courteous action to have taken under the circumstances.

After receiving notice of the presentation of the proposed Order Granting Appellee's Judgment, counsel for the Appellant still did nothing to inform the Court that he was even then engaged elsewhere. He still did nothing to request another hearing or have the Court's action set aside, as provided for under rules of the Trial Court.

Under the foregoing circumstances, the Trial Court was fully justified in signing the Order Granting the Judgment.

Even if this Court should consider that at the late date of October 4, 1957 when the Order for Judgment was presented for signature by the Court, the Appellant was requesting a continuance on the hearing on the Motion, it should consider that the granting or denying of the Motion for the continuance was within the sound discretion of the Trial Court.

> "Ordinarily attendance of counsel in another court does not give an absolute right of continuance."
>
> 17 Corpus Juris Secundum, Para. 38, Page 219
>
> "In order to secure a continuance, the party desiring it must make a proper application. A continuance will not ordinarily be granted unless the application with all formal requisites precede it. The usual practice is to make a direct application to the Court by motion for a continuance or postponement which, except when made in open court during trial or in disposition of a case called for trial, should be in writing and should usually be supported by an affidavit showing sufficient grounds to warrant the Court's exercise of discretion." (Underscoring supplied by Appellee.)
>
> 12 American Jurisprudence, Para. 29, Page 471.

In the two following cases which arose from this jurisdiction many years ago, the United States Supreme Court held that on appeal it could not consider the question of the denial of a continuance by the trial court. See Woods & Bemiss v. Young, 8 U. S. 237, 4 Cranch 237, 2 L. Ed. 607 and Thompson v. Selden, 61 U. S. 194, 20 Howard 195, 15 L. Ed. 1001. Even today it is generally held that the question of the denial of a continuance by the trial court will not be considered on appeal unless there has been an abuse of judicial discretion.

A more comparable factual situation to that in the instant case arose in the Sechrist Case where this Court stated:

> "Attorneys cannot of course, be in two places at once, and courts ought to be and are indulgent in granting continuance, where counsel and the parties represented by them, without fault of their own, are confronted with the impossible situation of proceeding with trial of different cases set for hearing for the same day and hour in different courts. If, however, the parties neglect to engage counsel until the day before an issue comes on regularly for hearing, and if counsel accept employment with full knowledge that, because of other commitments, they will be unable, at the time required, to render the service for which they are employed, it cannot be said that the client was diligent, or that counsel was prevented from performing his professional duty by unavoidable circumstances, or by unforseen contingency. (Underscoring supplied by Appellee.)
>
> Sechrist vs. Bryant
> 52 App. D.C. 351
> 286 Fed. 457

Appellant's counsel had notice from the Motions Clerk's Office of the lower court dated September 19, 1957 that the Motion for Summary Judgment had been set for hearing on October 2, 1957, a notice of at least twelve (12) days. He also knew by October 1, 1957 that this hearing on the Motion for Summary Judgment would conflict with the trial of the MADDOX divorce case. These facts are stated by the Appellant in her argument in her brief. Yet Appellant would have this Court conclude that she has been denied her right to be heard in this matter.

Moreover she would place the obligation upon the trial Court to ascertain by its own endeavor and inquiry the reason for the absence of her own counsel whom she had employed to represent her.

This Court has repeatedly stated that it will not review the question of the denial of a continuance in the Trial Court except for an abuse of judicial discretion.

Foertsch vs. Germuiller
9 App. D.C. 351

Goodyear Service v. Pretzfelder
65 App. D.C. 389
84 Fed. (2nd) 242

Harrah v. Morgenthau
67 App. D.C. 120
89 Fed. (2nd) 863

Also see: Logan v. Oliver
Munc. Ct. of App. D.C.
96 Atl. (2nd) 516

Appellee respectfully represents to this Court that under the circumstances in the instant case it was not an abuse of discretion by the Trial Court to deny the request for another hearing on the Motion for Summary Judgment after it had been heard when the Order for Judgment was presented for signature of the Trial Court on October 4, 1957.

2. Appellant Was Given a Full and Fair Hearing on The Motion Despite The Absence of Her Counsel

Appellant complains that she was denied a fair hearing on the Motion for Summary Judgment in the absence of her counsel. The record and transcript in this case refute this completely. Not only was the Motion not granted by default but the Trial Court made his own inquiry into the case. He inquired as to the basis for the Motion, he inspected the record in this case and in the prior case of Civil Action 3330-55 in the lower court and the disposition of the earlier case. He was convinced that Appellee was entitled to judgment as a matter of law.

Was there anything outside the record that Appellant's counsel could have furnished the Trial Court which might have persuaded him that Appellee was not entitled to judgment? The record was complete, so complete that Appellant filed no opposition to the Motion for Summary Judgment but merely filed an Answer one day before the hearing stating that there was an issue of fact.

3. Appellant is Bound By Her Counsel's Action, Having Selected Him as Her Attorney.

Appellant's counsel has represented her in this present case in the lower court and on this appeal. He represented her in the prior case in 1955 involving this same subject matter between the same parties. He was familiar with the matter and apparently Appellant had confidence in him and his ability to represent her. Having selected counsel of her own choice she is bound by his actions, whether the result be good or bad.

Olney v. Butte Creek Consolidated Dredging Co.
51 App. D.C. 11
273 Fed. 738

Turner v. Erwin
99 Atl. (2nd) 222
Munc. Court of Appeals, D.C.

4. Appellant Does Not Come Into Court With Clean Hands.

With the exception of the facts that the Motion for Summary Judgment was set for hearing on October 2, 1957, that other counsel appeared for the Appellant requesting a continuance on the hearing after it had been held and the fact that Appellant's counsel received a copy of the proposed order to have been presented on October 4, 1957, none of the statements set forth in Appellant's argument appear in the record. Nor does Appellee's counsel have any knowledge of these other facts alleged by the Appellant.

The Appellant does not seek a just and prompt disposition of this matter. What she seeks is delay. Appellee contends that the record in this case substantiates this allegation beyond any doubt, based on the following docket entries in the lower court and in this Court:

DOCKET ENTRIES IN THE TRIAL COURT IN CIVIL ACTION 1298-57

1957

May 29	Suit Commenced and Summons Served 6/3/57
	Motion for Preliminary Injunction Filed
June 14	Motion of Defendant for Security for Costs
July 1	Order for Security for Costs
3	Opposition of Defendant for Motion for Preliminary Injunction
	Answer of Defendant to Complaint Calendered
	Notice by Defendant to Take Deposition of Plaintiff
July 30	Deposit of $50 cash as Security for Costs
Aug. 19	Defendant's Motion for Summary Judgment Filed
Oct. 1	Answer of Plaintiff to Defendant's Motion for Summary Judgment
Oct. 4	Order Granting Defendant's Motion for Summary Judgment
Oct. 9	Notice of Appeal of Plaintiff
18	Designation of Record on Appeal by Plaintiff
24	Counter-designation of the Record on Appeal by Defendant
Nov. 18	Record on Appeal
Dec. 17	Certified Copy of Order of U. S. C. A. Extending Time for Appellant to File Supplemental Record to 12/21/57 and Denying Motion to Include Record in C. A. 3330-55
Dec. 19	Transcript of Proceedings, Oct. 2 and Oct. 4, 1957, Pages 1-16 Filed
Dec. 23	Supplemental Record on Appeal Delivered

DOCKET ENTRIES IN THIS COURT
NO. 14,220

1957	
Nov. 18	Transcript of Record
	Appearance of H. Eugene Bryan for Appellant
Nov. 21	Appearance of N. Meyer Baker for Appellee
22	Four Copies of Appellee's Motion to Dismiss.
Nov. 27	Four Copies of Appellant's Objection to Appellee's Motion to Dismiss
	Four Copies of Appellant's Motion to Supplement the Record
Dec. 4	Four Copies of Appellant's Consent to Supplement Record
Dec. 13	Per Curiam Order Denying Appellee's Motion to Dismiss
	Per Curiam Order Allowing Appellant to Supplement the Record; Allowing Appellant until December 21 to file Supplemental Record; and Denying Appellee's Motion to have Record of C. A. 3330-55 Included in the Record in this Case
Dec. 26	Four Copies of Appellant's Motion for Extension of Time to File Supplemental Record
Dec. 28	Four Copies of Appellant's Motion to Extend Time to File Brief for a 30 day Period
1958	
Jan. 6	Order Directing Clerk to File Appellant's Supplement Record Forthwith
	Supplemental Transcript of Record
Jan. 9	Order Extending Time to File Appellant's Brief to January 28; no Further Extensions to be Granted Except Upon Extraordinary Cause Shown
Jan. 28	Typewritten Copy of Appellant's Brief
Feb. 3	Appellant's Certificate of Brief to Printer, Pursuant to Rule 18(d)
Feb. 7	Twenty five Copies of Appellant's Brief and Appendix (filed January 28th) Received and Proof of Service
Feb. 10	Four Copies of Appellee's Motion to Dismiss

Appellant initiated this litigation and she became charged with its prosecution as the moving party. Nevertheless from the record, she not only has failed to pursue her suit but has in fact sought to delay its orderly disposition. Clearly she did not intend for the Court to act on her motion for the injunction because she neither filed a verified complaint as required by Rule 65(b) F. R. C. P. nor did she calender the motion as required by the trial Court's local Rule 9(b).

Instead of seeking to have the trial Court set aside its Order of October 2, 1957 by applying to the Court as provided for under Rule 60(b), she promptly on October 9, filed a Notice of Appeal to this Court although she had thirty days from October 4, 1957 in which to note her appeal.

Aside from the foregoing, Appellant as maker and her counsel as endorser were obligated to pay the second trust note that they sought to have the trial Court "reform". Yet they had been paying on this note obligation for nearly two years (March 8, 1955 to March 4, 1957)(R. 1). They filed the instant suit when default occurred in the payment of this note obligation and the holder of the note demanded payment in full. Since the March 4, 1957 date, no second trust payments have been made or tendered in fact. Repeated defaults in making prompt payment on the first trust loan by Appellant secured on the real property involved herein have required the holders of this first trust obligation to frequently threaten foreclosure. (R. 8) In the interval, Appellant has collected the rents from the property for her own benefit and profit.

Appellee contends that the Appellant filed the instant suit in court below and appealed the same solely to delay the matter and postpone the date when she would be required to settle her just obligation. Both she and her counsel are now estopped to deny these facts.

APPELLEE'S REQUEST FOR INTEREST, DAMAGES and DOUBLE COSTS BECAUSE THIS APPEAL TAKEN FOR DELAY

For the foregoing reasons Appellee claims damages in the amount of ten (10%) per cent of the amount of the second trust obligation ($1,497.20), plus interest at six (6%) per cent from March 4, 1957 plus the allowance of double costs on appeal as provided for under Rule 23 of this Court because Appellant's actions have delayed the proceedings in the lower Court and this appeal has been taken by the Appellant for the sole purpose of delay.

CONCLUSION

Appellee respectfully requests that this Court affirm the judgment of the lower Court and grant him the interest, damages and double costs requested in this matter.

Respectfully submitted,

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